RECORDS AND BRIEFS

No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Petition for Writ of Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Twice in the past five years, this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, __ U.S. __, __, 134 S. Ct. 2618, 2632-34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2289 (2012). Last term this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, __ U.S. __, 136 S. Ct 1083 (2016).

This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public-sector agency fee arrangements be declared unconstitutional under the First Amendment?

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STATEMENT OF AMICUS CURIAE

This amicus brief is submitted by the Buckeye Institute for Public Policy Solutions (the "Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). It has long advocated policies that guarantee to workers a genuine choice

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[1] Pursuant to Rule 37.2, all parties were notified of the Buckeye Institute's intention to file this brief at least 10 days prior to its filing. All parties consented to the filing.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or their counsel made a monetary contribution to the brief's preparation or submission.

as to whether to join a union or spend their money to support a union. The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals. Examples of recent amicus efforts include the briefs it filed in *Center for Competitive Politics v. Harris*, No. 15-152 and *Mason Companies* v. *Testa*, Supreme Court of Ohio, No. 15-0794.

SUMMARY OF ARGUMENT

This Court's decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), rests on the belief that unions can assess agency fees against nonmembers covered by a union contract because the union performs a "service" that "benefits" all members of the bargaining unit. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the dissenters contended that, because this assessment has been ongoing since *Abood* on 1977, the apple cart should not be upset. That contention in turn rests on the view that unions need the help.

Nothing could be further from the truth. The enactment of right-to-work laws has not killed the unions. Rather, in both Indiana and Oklahoma, union membership increased after those states enacted right-to-work laws. Union spending in Indiana also increased. And, union officials have responded by increasing their efforts to serve their members and stepping up their recruitment of nonmembers. Put simply, the evidence shows that the unions do not need *Abood*.

ARGUMENT

1. Introduction

In *Harris v. Quinn*, this Court noted that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. It went on to show why that "unsupported empirical assumption" was "unsupported" for two reasons *Id.* First, as the Court observed, "A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Id.* at 2640. The benefits of labor peace can be achieved without requiring non-members to contribute agency fees, as the experience of unions in some federal agencies shows.[2] Second, the benefits received by personal assistants in Illinois after SEIU began to represent them could not be shown to be unachievable without the agency fees on non-members. *Id.* at 2641.

Given the "unsupported" nature of the asserted importance of exclusive representation in the public sector, what effects are likely to flow from

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[2] In her dissent, Justice Kagan also recognized that there is no "inextricabl[e]" connection between exclusive representation and the need to collect agency fees from non-members. As the dissent points out, while the American Federation of Government Employees represented some 650,000 federal employees in 2012, fewer than half of them were dues-paying members. *Harris v. Quinn*, 134 S. Ct. at 2657, fn. 7 (Kagan, J., dissenting)(citing R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014)).

ending the mandatory payment of agency fees to those exclusive representatives? Nonunion members can be protected from the First Amendment harms created by the compulsory collection of agency fees without harming unions or their would-be voluntary members. In fact, a ruling in favor of Janus is likely to encourage union leadership to pay more attention to the needs and desires of union membership and, thereby, increase membership's satisfaction with their union.

2. Union membership is unlikely to decline significantly in response to a ruling in favor of the Petitioner Janus.

A ruling in favor of Petitioner will enable some public union members to opt out of paying some or all of their agency fees. Any expectation that the result will be catastrophic for the public unions is not well founded for two reasons. First, the experience in states that have recently enacted right-to-work laws does not support fears of a dramatic loss in union membership. Second, labor relations research regarding free ridership does not suggest a dramatic change.

A. Giving dissenting union members greater freedom to disaffiliate is unlikely to affect union membership significantly.

Some believe that a state's enactment of a right-to-work law will start a rush for the doors on the part of union members. The recent enactments of right-to-work laws by Indiana and Oklahoma do not, however, confirm that view.

As a general matter, disaffiliation and deunionization has been going on for some time. Indeed, it is a long-term trend that is plainly independent of this Court's decisions in *Harris v. Quinn* and *Knox v. SEIU*, 132 S. Ct. 2277 (2012).

More to the point, that long term decline in unionization is also "independent of [right-to-work] policies." B. Collins, Right to Work Laws: Legislative Background and Empirical Research (Cong. Res. Serv. 2014), at 9 ("Collins"). "[U]nion membership rates have declined in both [right-to-work] and union security states since 1983. The share of workers covered by a collective bargaining contract (i.e., union members plus covered workers who are not members) has followed a similar trend." *Id.*

That trend has, however, been bucked in Indiana and Oklahoma, both of which recently enacted right-to-work laws. In both states, the rate of growth in the unionized population increased *after* the right-to-work laws became effective.

Indiana's experience with the enactment of a right to work law in 2012 and its aftermath are "far from 'union busting.'" Tom Lampman, Surprising Results from Indiana's Right-to-Work Law, (Sept. 4, 2015) at 4 available at http://buckeyeinstitute.org/uploads/files/Surprising_Results_from_Indianas_Right-to-Work_Law.pdf (last viewed July 5, 2017) ("Lampman"). In Indiana, union membership decreased in 2009 and again in 2012, when the law was passed. But, it subsequently recovered, increasing substantially in 2014 to a level as close to the national average as it has been since

2008. *Id.*[3]; *see also Right To Work Not Decreasing Union Membership*, Indiana Public Media (July 25, 2014), *available at* http://perma.cc/A6ND-S4KG (Indiana added 3,000 union members in 2013, the first full year after its enactment of a right-to-work law.). Lampman, formerly a Buckeye Institute scholar, concludes that "nothing in the data collected so far suggests that Indiana's right-to-work law has harmed unions' ability to recruit or retain members." Lampman at 5.

The results from Oklahoma are to similar effect. While Oklahoma is less unionized than the nation overall, the rate of growth in the unionized population in Oklahoma increased to a level greater than the national level after the right-to-work law was enacted. Lampman at 5-6.

The results from Indiana and Oklahoma are consistent with the overall trends. Between 2004 and 2013, overall union membership increased by 0.5% in right-to-work states but fell by 4.6% in states with government coerced union fees. See Jason

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[3] While some scholars have raised questions about public-sector union data in the United States Census Bureau and the Bureau of Labor Statistics Current Population Survey (CPS), see, e.g., Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey's Public Sector Unionism Data Sufficiently Reliable?* U. Chi. Legal F. (Forthcoming November 2017), this brief relies on data derived from CPS for two reasons. The CPS data remains "the primary source of labor force statistics for the population of the United States," and it is widely acknowledged to be the gold standard for such data. United States Census Bureau, Current Population Survey, *available at* https://www.census.gov/programs surveys/cps.html (last viewed July 5, 2017).

Russell, *How Right To Work Helps Unions and Economic Growth*, Economics21 (Aug.27, 2014), available at http://perma.cc/4KQM-6WEL Moreover, ten of the eighteen states that experienced an increase in union membership between 2013 and 2014 were right-to-work states. See News Release, Bureau of Labor Statistics, *Union Members 2014*, USDL-15-0072 (Jan. 23, 2015), Table 5, available at http://perma.cc/SHA5-ACSP.

B. The number of likely opt-outs is smaller than the number of covered non-union members.

Any increase in the number of "free riders" that is likely to result from a ruling in favor of Janus is unlikely to be significant. Put simply, if Janus and others similarly inclined were required to join the union (instead of not joining and paying the agency fee), some would join, and more would likely look for other nonunion work. That conclusion flows from research regarding the nature and extent of free ridership.

As one scholar has concluded, right-to-work laws can simultaneously lead to free riding and have a small effect on union membership. Russell S. Sobel, "Empirical Evidence on the Union Free-Rider Problem: Do Right-to-Work Laws Matter? The Military College of South Carolina School of Business Administration, accessed July 5, 2017, http://sobelrs.people.cofc.edu/All%20Pubs%20PDF/Do%20Right-to-Work%20Laws%20Matter.pdf ("Sobel"). Based on his research, Sobel estimates that "no more than 30 percent of the covered nonmembers" would become union members if they

were forced to, and that "approximately 70 percent of the covered nonmembers in [right-to-work] states would switch to nonunion jobs if [right-to-work] laws were repealed." Id. at 361.

Sobel divides covered non-union members into true free riders and induced free riders. He defines true free riders as those who "are not currently paying the costs of membership because they know they will receive the benefits of coverage anyway. Sobel at 348. In contrast induced free riders would "opt out of union membership by finding a nonunion job" because they value the benefits of coverage less than their jobs. Sobel at 348. They "are only induced to take the union-covered job because they do not have to pay the cost of membership." *Id.*

Sobel notes that it is important to distinguish between true and induced free riders. "[I]f [right-to-work] laws were to be repealed and union shops were formed, only the true free riders would become and remain union members." *Id.* at 348. Conversely, the induced free riders would look for a nonunion job. "[T]he greater proportion of the total covered nonmembers that are induced riders, the less union membership is affected by [right-to-work] laws." *Id.*

Sobel's analysis of survey data yields estimates of the number of true and induced free riders. For true free riders, the average of his estimates from 5 models is 14.83% for non-right-to-work states, and 14.29% for right-to-work states, and an overall average of 14.62%. Sobel at 358-59. He observes that, "while there is a larger percent of covered workers who are not union members in [right-to-work] states, there is not a large difference

in the proportion of the covered nonmembers who are true free riders." *Id.* at 359.

The limit on the likely number of new disaffiliations that would occur if unions are barred from collecting agency fees from nonmembers can be seen in two ways. First, nationally, about 17% of the workers covered by a union contract are nonmembers in right-to-work states; they are about 7% of the total in union security states. James Sherk, "Right-to-Work Laws Don't Lower Private-Sector Pay" (Heritage Foundation Issue Brief No. 4457, September 1, 2015); *see also* Sobel at 349, 361. The 17% and 7% figures should be seen to include both true free riders and induced free riders. Sobel found that "approximately 70 percent" of the covered nonmembers in right–to-work states are induced free riders, who would look for a nonunion job if the right-to-work law was repealed. That 70% of the 7% would represent the likely limit of the effect of a ruling in favor of Janus. Accordingly, the number of likely opt-outs is limited, which helps to explain why the enactment of right-to-work laws in Indiana and Oklahoma did not lead to catastrophic losses in union membership.

3. The enactment of a right-to-work law in Indiana has not reduced union spending.

As a general matter, union dues should be expected to be more reasonable and to reflect the value of market services provided more closely when employees have a choice about whether to support a union financially. James Sherk notes that union dues are on average 10% lower in right-to-work states than in states where nonmembers can be

compelled to pay agency fees. See James Sherk, *Unions Charge Higher Dues and Pay Their Officers Higher Salaries in Non-Right-To-Work States*, Heritage Foundation Backgrounder No. 2987 at 6-7 (Jan. 26, 2015) ("Sherk"), *available at* http://perma.cc/9B5A-C9W6. He explains that "unions act like corporations when using their monopoly power" in that both "tend to raise prices when their customers have no other options." *Id.* at 7.

That said, Indiana's move to voluntary membership through the enactment of a right-to-work law did not starve the unions of funds. Rather, gross spending for the state's larger unions increased, and its allocation was largely unchanged. In short, the loss of some agency fees did not have a substantial effect on union activities.

Predictably, Indiana's unions increased their political spending during the legislative debate over the right-to-work law. "Since the [right-to-work] law was enacted, spending by the state's large unions did not taper off or return to earlier levels. Instead, average spending by these unions has risen significantly and is now well above the spending averages seen before the law was passed." Lampman at 1-2.

While union spending in Indiana increased, "the state's right to work law has had virtually no meaningful effect on how Indiana unions spend their money and allocate their resources." Lampman at 2. Spending on representational activities increased slightly in 2013 and 2014, and the percentage of spending on overhead and administration went down

slightly. *Id.* Spending on other activities is comparable to what it was in 2010 and 2011. *Id.* at 3.

Lampman also explains how the changed allocation in union spending is good for the unions:

> Higher representational spending and lower overhead costs signal that unions may be becoming more competitive and more concerned about their membership. Without the forced agency fees from non-members, unions must become more efficient and prove themselves more attractive to workers in order to boost and maintain their membership. These are positive steps for unions and the workers they represent.

Id. at 3.

4. Union leadership can respond by refocusing its attention on actions that are likely to increase worker satisfaction with the union and their jobs.

Labor relations research shows that union membership does not improve union members' satisfaction with their jobs. Some union leaders see the challenge as one to be met through their efforts, not by using the state's power to coerce nonmembers to pay agency fees.

A. Union membership does not correlate with job satisfaction.

"One of the most consistent findings in the industrial relations literature is that job satisfaction is lower among unionized workers than

nonunionized workers." Michael E. Gordon & Angelo S. Denisi, *A Re-Examination of the Relationship Between Union Membership and Job Satisfaction*, 48 Ind. & Lab. Rel. Rev. 222 (1995) at 222; see also Ronald Meng, The *Relationship Between Unions and Job Satisfaction*, 22 Applied Economics 1635, 1635 ("The empirical results tend to be uniform. Union members report significantly less job satisfaction than their non-union counterparts.")("Meng"). As two other scholars put it, "[I]n general there is evidence that while unions may have a strong positive effect on money wages, they have a strong and negative effect on job satisfaction." Jane H. Lillydahl & Larry D. Singell, *Job Satisfaction, Salaries and Unions: The Determination of University Faculty Compensation*, 12 Econ. of Educ. Rev. 233, 233 (1993)("Lillydahl & Singell).

Lillydahl and Singell note, "One of the more robust findings in the literature is that union workers express more job dissatisfaction than non-union workers." Lillydahl & Singell at 234. They looked at unionized and nonunionized universities and found that full and associate professors at the unionized schools earned more than their nonunion counterparts. *Id.* at 235. Even so, the effect of union membership on job satisfaction is negative, which "means that union membership is associated with aspects of one's job other than salary." *Id.* at 238. Lillydahl and Singell explain, "[U]nion faculties express lower levels of satisfaction with the quality of the university environment, the support services for teaching and research, and the authority they have over their work assignments." *Id.* at 242.

Ronald Meng has reached similar conclusions with respect to the attitudes of Canadian union members toward their unions. He found that unionized workers are more satisfied with their compensation and job security than they are with other aspects of their jobs, like how interesting they are, whether they're free to decide what work they will do, and whether they have influence over their superior's decisionmaking. Id. at 1639-42, 1646.

If union membership does not correlate with job satisfaction, it makes little sense to compel nonmembers to support unions with agency fees. Rather, unions should convince workers of their value.

B. The solution is for union leaders to pay less attention to political matters and more attention to their members and their priorities.

The Washington Post reported that "it took mortal danger for some unions to realize they've taken their membership for granted." See http://www.washingtonpost.com/news/wonkblog/wp/2015/07/01/the-supreme-courts-threat-to-gut-unions-is-giving-the-labor-movement-new-life. One union activist explained, "A lot of people have lost faith in the union [AFSCME], because they haven't seen anyone." *Id.* AFSCME President Lee Saunders candidly acknowledged, "We stopped communicating with people because we didn't feel like we needed to." *Id.* As a result, union leaders are "reaching [out to] workers who may have been paying agency fees for years and never had any contact with a union representative." *Id.*

In the same way, after this Court's decision in *Harris v. Quinn*, Secretary-Treasurer Gary Casteel of the United Auto Workers recognized the need for management to pay attention to members. He saw that right-to-work laws were not the end of unions, but a spur to activity. Casteel explained, "If I go on an organizing drive, I can tell these workers, 'If you don't like this arrangement, you don't have to belong.' Versus, 'If we get 50 percent of you, then all of you have to belong whether you like it or not.' I don't even like the way that sounds, because it's a voluntary system, and if you don't think the system's earning its keep, then you don't have to pay." *See* http://www.washingtonpost.com/blogs/wonkblogs/wp/2014/07/01/why-quinn-v-harris-isnt-as-bad-for-workers-as-it-sounds.

In states that require the payment of agency fees, the union officials' lack of responsiveness is a predictable outcome of the lack of meaningful choice for employees. It might also be a result of the fact that "unions do not have to cultivate workers' support to remain their representatives." James Sherk, One Man, One Vote, One Time? Re-election Votes Hold Unions Accountable to Their Members, The Buckeye Institute (Sept. 5, 2016), at 1. ("One Man, One Vote"). As Sherk explains, "Inherited representation ... makes [unions] less responsive to their members' concerns." *Id.* at 4.

In One Man, One Vote, Sherk observes, "Only 7 percent of private sector union members voted for their union." *Id.* at 2. That follows from the fact that, in many instances, the union was recognized as the exclusive bargaining agent long before the employees

came to work. Take General Motors, where the UAW was recognized as the bargaining agent in 1937. Present GM workers "inherit" their unions, they do not choose them *Id.*

One result of the unions' immunity from market forces is union member dissatisfaction with their union representatives. More private sector and government union members disapprove of America's union leadership than approve of it. *Id.* 66% believe that union officers primarily look out for themselves, and 63% consider union leaders to be overpaid. *Id.* 57% think union dues are too high for the value they return. *Id.*

Instead of relying on state coercion to generate agency fees, union leadership concerned about the size of membership rolls could choose to follow the lead of the AFSCME and UAW officials in the stories above. Union leaders could reach out to members and covered nonmembers and sell them on the benefits of union membership.

Union officials could focus their attention on the priorities of their members, including their administrative overhead costs. More specifically, "[i]tems such as wages, fringe benefits, health insurance, and job security consistently rank at the top of the members' lists of priorities. Job content and quality of work life issues come lower down. Political goals are quite low." Daniel G. Gallagher & George Strauss "Union Membership Attitudes and Participation," *in* THE STATE OF THE UNIONS (1991)("Gallagher and Strauss"), 139 at 143; see also Meng at 1639 n. 8 ("By politicizing their members unions lead workers to report less job satisfaction.").

Gallagher and Strauss also explain, "Membership satisfaction is based, in part, on how well the union meets expectations with regard to traditional collective bargaining 'bread-and-butter' issues. However, to a surprising extent satisfaction is also strongly related to internal union process, for example, whether officers listen to the members, handle grievances fairly, provide feedback, and permit members to have a say in the union's governance." Gallagher & Strauss, at 167-68.

In contrast to those productive strategies, , unions spend big money on politics and lobbying. Between 2005 and 2011, unions spent $4.4 billion on political advocacy. See Tom McGinty and Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, Wall Street Journal (July 10, 2012). The National Education Association spent $40 million in the 2014 mid-term election cycle alone, and the American Federation of Teachers spent $20 million. Lauren Camera, *Teachers' Unions to Spend Far More Than Ever in State, Local Elections*, Education Week (Oct. 22, 2014). Certainly, unions have the constitutional right to spend as much on political causes and to direct that funding as they want. Even so, "[f]ully 60 percent of union members oppose such [political] spending on their behalf." One Man, One Vote at 5.

Finally, unions in right-to-work states are more conservative in their spending on overhead costs, which contribute little to employee satisfaction. One econometric study found that union officials paid themselves an average of $20,000 more in union security states than in right-to-work states

(even after controlling for broader economic conditions in each state). Sherk at 11.

In short, unions are capable of standing on their own. They don't need *Abood's* help.

CONCLUSION

For the foregoing reasons and those advanced by Petitioner, this Court should grant certiorari and, on review, reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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